

VERMONT ENVIRONMENTAL BOARD
10 V.S.A. §§ 6001-6092

Re: Nehemiah Associates, Inc.
Application #1R0672-1-EB (Remand)

MEMORANDUM OF DECISION

This decision pertains to a Motion to 'Alter filed by Nehemiah Associates, Inc. As explained below, the Board denies the Motion to Alter.

I. BACKGROUND

On April 11, 1997, the Board issued Re: Nehemiah Associates, Inc., Application #1R0672-1-EB (Remand), Findings of Fact, Conclusions of Law, and Order (April 11, 1997) ("Remand Decision"). The Remand Decision sets forth the procedural history of this appeal. As further described therein, the Remand Decision denies the application for the subdivision of a 3.38 acre parcel of land into three lots ("Project").

On April 30, 1997, Nehemiah Associates, Inc., filed its Motion to Alter ("Motion").

On May 1, 1997, Dorothy Perkins filed a response to the Motion.

On May 15, 1997, the Chair of the Environmental Board issued a status memorandum to the parties.

On June 11, 1997, the Board deliberated regarding the Motion.

II. DECISION

The Motion is brought pursuant to Environmental Board Rule ("EBR") 3 I(A), and raises three issues. First, the Motion contends that the Remand Decision fails to properly comply with the Vermont Supreme Court's decision in In re Nehemiah Associates, Inc., Docket No. 95-561 (Dec. 6, 1996). Second, the Motion contends that the Remand Decision has once again balanced the reliance interests of adjoining lot owners on a non-existent deed covenant requirement, and that the Project denied by the Remand Decision was not foreseeable. Third, the Motion contends that there is no standard of "finality" versus "flexibility" such that compliance with Criterion 8 has been demonstrated as a matter of law, and that a permit should issue.

The Court's decision did not order the Board to issue a permit. Rather, it clearly states "[r]everse and remanded for the Board to balance the policy considerations raised by the parties to determine whether to grant the permit amendment." The Remand Decision does this based on the open land paragraph being a substantive requirement of

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condition #9 of the 1989 Commission Permit and not a deed covenant requirement, and consistent with the Court's decision in In re Stowe Club Highlands, Docket No. 95-341 (Nov. 8, 1996). The Remand Decision is also clear in its statement that the issue of foreseeability relates to whether the lot owners, or the Commission, reasonably relied upon condition #9 of the 1989 Commission Permit *under Criterion 8*. Finally, the Board concludes that the Court's Stowe Club decision confirms that the balancing of flexibility and finality is appropriate as a threshold issue where a permittee attempts to negate a permit condition imposed as a mitigating measure under one or more of the Act 250 criteria by obtaining a permit amendment.

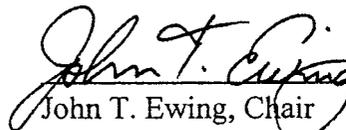
The Motion's concluding point is that the Remand Decision is "result oriented." The Board disagrees with this contention, As the Remand Decision states, the open land paragraph as a substantive requirement of condition #9 pursuant to Criterion 8 is the most useful way to lessen the impact of the subdivision authorized by the 1989 Commission Permit. Numerous Act 250 permits contain landscaping or open land conditions which mitigate an undue adverse effect on aesthetics. EBR 34's implicit recognition that permitted projects are not static and fixed in time makes it even more imperative that such conditions remain unaltered, notwithstanding the course of normal development in the surrounding area. Such conditions are vital to protecting the environment as well as for allowing development.

III. ORDER

1. The Motion to Alter is denied.
2. The application for the Project is denied based on the policy of finality outweighing the policy of flexibility as set forth in the Remand Decision and herein. Jurisdiction is returned to the District #1 Environmental Commission.

Dated at Montpelier, Vermont, this 13th day of June, 1997.

ENVIRONMENTAL BOARD



John T. Ewing, Chair

Marcy Harding
Samuel Lloyd
William Martinez
Rebecca M. Nawrath